

CONVICING OFFENDERS ON CHARGES OF SEXUAL VIOLENCE DURING ARMED CONFLICT

Anju Anna John*

INTRODUCTION

JUSTICE FOR THE SEX SLAVES OF ISIS

On 16th September, 2016, Amal Clooney appeared before the United Nations (UN) General Assembly along with Nadia Murad, a Yazidi woman who was captured by the Islamic State of Iraq and Syria (ISIS) in 2014 and trafficked as a sex slave before she finally escaped.⁴⁵ Amal Clooney is representing Nadia Murad. After Miss Murad spoke of the horrific experiences she had to live through, Amal Clooney took the stage to remind everyone at the General Assembly that what Miss Murad had just recounted amounted to Genocide and called upon them to take action towards prosecuting the ISIS for their atrocities.⁴⁶

About six months later, on 9th of March, 2017 Amal Clooney was before the General Assembly once again. She informed the General Assembly about the initiative by the United Kingdom's initiative to have the Security Council set up an investigation into the crimes perpetrated by the ISIS.⁴⁷ Although Iraq has expressed its support for the resolution moved by the United Kingdom (UK) for taking action to gather and preserve evidence on

*Law Researcher at the Delhi High Court.

⁴⁵ Heather Saul, *Amal Clooney Delivers damning speech to the UN over failure to stop ISIS 'genocide': 'I am ashamed'*, The Independent, (Sept. 17, 2016 15:15 BST), <http://www.independent.co.uk/news/people/amal-clooney-delivers-damning-speech-to-the-un-over-isis-genocide-i-wish-i-could-say-im-proud-to-be-a7313551.html>

⁴⁶ *Id.*

⁴⁷ Peter Walker, *Amal Clooney: Full transcript of human rights lawyer's UN speech on Isis*, The Independent, (Mar. 10, 2017 11:27 GMT), <http://www.independent.co.uk/news/world/americas/amal-clooney-speech-in-full-transcript-human-rights-lawyer-isis-iraq-speech-un-united-nations-a7622176.html>.

ISIS' crimes, it is yet to send a letter to the UN Security Council (UNSC) seeking such an investigation. Neither has there been any move by the various UN bodies to take measures to commence such an investigation.

However, the prosecution of the ISIS at the International Criminal Court (ICC) is still a bleak possibility considering that neither Syria, nor Iraq are parties to the Rome Statute⁴⁸. The chances of the prosecutor initiating an investigation⁴⁹ is even more unlikely since it would open a Pandora's Box.

The present impasse has thrown the limelight again on the issue of sexual violence during armed conflicts. However, the inaction by the UN is not something new. We have examples strewn across history of sexual violence during armed conflict which the International Community either did not even acknowledge, or only got around to doing something too little too late.

THE AMBIT OF SEXUAL VIOLENCE

At the outset, it becomes pertinent that we understand the crime itself. In her book *Against Our Will: Men, Women, and Rape*⁵⁰, Susan Brownmiller speaks of Rape as "man's basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations and struggle, became the vehicle of

⁴⁸ *Rome Statute Of The International Criminal Court*, U.N.T.S. 90, (entered into force 1 July, 2002), art 11(2) it allow the Court to exercise jurisdiction with respect to crimes committed after the entry into force of the Rome Statute for a State; & art 12(3) or by the acceptance of a State by declaration lodged with the Registrar of the ICC with respect to the crime in question.

⁴⁹ *Rome Statute Of The International Criminal Court*, U.N.T.S. 90, (entered into force 1 July, 2002), art 13(b) & art 13(c) of the Rome Statute allows for the UN Security Council to refer a crime to the Prosecutor and the also allows for the Prosecutor to initiate an investigation in respect of a crime respectively.

⁵⁰ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1st Ballantine Books ed. 1993).

victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood.”⁵¹

Although rape, sexual assault, and sexual violence are often used interchangeably, they each generally have different scopes of meaning. Rape generally denotes vaginal, oral, or anal sexual intercourse without the consent of one of the people involved.⁵² Sexual assault would generally hold a broader meaning and include rape and other forced or coerced sexual acts, as well as mutilation of genitals.⁵³ Lastly, sexual violence is an even broader term, and it is used to describe any kind of violence carried out through sexual means, or by targeting sexuality.⁵⁴

While municipal laws have traditionally defined and prosecuted the offence of sexual violence in the domestic setting, this article seeks to look at the development relating to the development of jurisprudence surrounding sexual violence in International Criminal Law. The paper seeks to look at the issue of sexual violence in early armed conflict and move on to mainly focus on events that transpired since the Second World War. A large part of the jurisprudential developments on this issue arose following the ruling of the Ad Hoc Tribunals set up following the genocides in former Yugoslavia and Rwanda. The cases from these two tribunals will be looked at together as each of them have been influenced considerably by the developments in the other. The research would then move on to the considerable steps taken to address this issue in the Rome Statute and how this has played out in the cases relating to sexual violence before the ICC. It would then study the issues that still persist today in this field and conclude by considering the way forward.

⁵¹ *Id.* at 14.

⁵² M. Cherif Bassiouni, Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No.1, International Human Rights Law Institute, DePaul University College of Law. 1, 3 (1996).

⁵³ *Id.*

⁵⁴ *Id.*

THE HISTORY OF SEXUAL VIOLENCE IN ARMED CONFLICT

In Babel's *Women Under Socialism*⁵⁵, he speaks of how when the earliest human tribes sought to cultivate land, there resulted power struggles that first led to the rape of women and then the enslavement of conquered men. Thus, women were used as labourers as well as objects of pleasure by the conqueror.⁵⁶ This early instance of battle resulting in sexual violence against women is something that has persisted to this day. It has been a commonly held view throughout the annals of history that women were a part of the "spoils of war".⁵⁷

THE FUNCTIONS OF RAPE

Ruth Seifert⁵⁸ provides four hypothesis for the function of Rape during and after wars; a) Rape is an inevitable part of war and is conceded to the victors, b) women are used as a means to reaffirm the victor's masculinity and humiliate the opponent, c) to reaffirm the cultural construct of masculinity, and d) it is aimed at destroying the opponent's culture because of the important role women play within the family structure.

RAPE AS A BY-PRODUCT OF WAR

Rape has accompanied wars of religion and wars of revolution.⁵⁹ "It (Rape) was a weapon of terror as the German Hun marched through Belgium in World War. Rape was a weapon of revenge at the Russian Army marched to

⁵⁵ AUGUST BABEL, *WOMEN UNDER SOCIALISM* 27 (Daniel De Leon, Ebook 2009).

⁵⁶ *Id.*

⁵⁷ *Women2000: Sexual Violence and Armed Conflict: United Nations Response*, United Nations (Dec. 30, 2010, 21:33 GMT), <http://www.un.org/womenwatch/daw/public/cover.pdf>

⁵⁸ Ruth Seifert, *War and Rape. Analytical Approaches*, Women's International League for Peace & Freedom (Aug. 05, 2014, 09:03 GMT), http://wilpf.org/wp-content/uploads/2014/08/1992_War_and_Rape.pdf

⁵⁹ BROWNMILLER, *supra* note 52, at 31.

Berlin in World War II”.⁶⁰ Ancient Greeks viewed rape as “socially acceptable behaviour well within the rules of warfare, an act without stigma for warriors who viewed the women they conquered as legitimate booty, useful as wives, concubines, slave labor or battle-camp trophy”.⁶¹

Brownmiller is of the studied view that “when killing is viewed as not only permissible but heroic behaviour sanctioned by one’s government or cause, the distinction between taking a human life and other forms of impermissible violence gets lost, and rape becomes an unfortunate but inevitable by-product of the necessary game called war”.⁶² For the longest time, sexual violence in conflict was looked upon as a by-product of armed conflict, rather than as a criminal act.⁶³

WORLD WAR II

Following the Second World War, the Allied Powers set up International Tribunals in Europe and in the Far East. The Courts set up in Nuremberg and Tokyo to prosecute individuals for crimes under international law. The applicable laws at the time were the Hague Convention and its Regulations of 1907⁶⁴ and the Geneva Conventions of 1929.⁶⁵ These laws were limiting in two ways, it would only apply if the offence was committed by an individual of one State, against an individual of another State. Moreover, the

⁶⁰ *Id.*

⁶¹ *Id.* at 33.

⁶² *Id.* at 32.

⁶³ Suk Chun & Inger Skjelsbæk, *Sexual Violence in Armed Conflict*, International Peace Research Institute, Oslo, Policy Brief 1/2010 (Nov. 05, 2012, 14:12 GMT), http://file.prio.no/Publication_files/Prio/Sexual-Violence-in-Armed-Conflicts-PRIO-Policy-Brief-1-2010.pdf

⁶⁴ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 187 CTS 227; 1 Bevans 631 (entered into force 18 October 1907)

⁶⁵ *Geneva Convention of 27 July 1929, Relative to Treatment of Prisoners of War*, July 27, 1929, 47 Stat. 2021, T.S. No. 846 (entered into force 19 June 1931)

Hague Convention had a *si omnes* clause⁶⁶, by which only individuals from State parties to the Hague Convention could be prosecuted against. However, Article 82 of the Geneva Conventions of 1929 explicitly made the Convention applicable to belligerents not party to the Convention. Thus, reversing the *si omnes* clause of the Hague Convention.

It is worth noting that a wide reading of the Marten's Clause contained in the Preamble of the Hague Convention (IV) made it possible to prosecute the individuals in the Nuremberg Tribunal and the Far East Tribunal for "acts of persecution against the population of the invaded countries on racial, political, or religious grounds and to extend the concept of war crimes to victims other than nationals of the United Nations, and to offences committed before the outbreak of the war in September 1939."⁶⁷ However, the tribunals stopped short of using this Clause to prosecute the individuals on charges of sexual violence.

NUREMBERG TRIBUNAL

The Chief Prosecutor of the Nuremberg Tribunal decided against presenting sexual crimes against the Nazi leaders who were tried for various offences relating to crimes against peace, war crimes, and crimes against humanity under Article 6 of the International Military Tribunal.⁶⁸ Even though the Nuremberg Tribunal did receive evidence of sexual atrocities, crimes relating to sexual violence were neither charged, nor referred to in the Tribunal's Judgment.⁶⁹ This was reflective of the fact that even individuals

⁶⁶ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 187 CTS 227; 1 Bevans 631 (entered into force 18 October 1907; art 2).

⁶⁷ MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 185 (2002).

⁶⁸ Luis Moreno-Ocampo, *Keynote Address – Interdisciplinary Colloquium on Sexual Violence as International Crime : Interdisciplinary Approaches to Evidence*, 35 Law & Soc. Inquiry 839 2010, at 842.

⁶⁹ Women 2000, *supra* note 59.

from the Allied powers (mainly the Soviet Union) were guilty of sexual violence.

TOKYO TRIBUNAL

The International Tribunal for the Far East (Tokyo Tribunal), on the other hand, did convict Japanese war criminals on charges of rape.⁷⁰ However, it stopped short of considering the military sexual slavery of comfort women⁷¹.

In the case before the Tokyo Tribunal⁷², General Matsui Iwane was indicted for charges that included “mass murder, rape, pillage...”, as he had been the commander-in-Chief of the Japanese Forces, and was commander of Japan’s Central China Expeditionary Force. The Rape of Nanking that unfolded over a six to seven week period, had resulted in thousands of women being raped by the Japanese soldiers.⁷³

The Tokyo Tribunal convicted him, holding him responsible for the happenings of the city, as he would have been aware of the atrocities committed by his troops at Nanking and did not take steps to prevent the same. He was convicted under Count 55 for “deliberately and recklessly disregarded their [*sic*] legal duty to take adequate steps secure the observance and prevent the breaches thereof”.⁷⁴ He was sentenced to death by hanging.⁷⁵

⁷⁰ Bridget Mannix, *A Quest For Justice: Investigating Sexual and Gender-Based Violence at the International Criminal Court*, 21 James Cook U. L. Rev. 7 (2014-2015).

⁷¹ *Id.*

⁷² Military Tribunal for the Far East, judgment of 12 November 1948, Tokyo War Crimes Trial, Vol. 22 (Aug. 21, 2009, 15:05 GMT) <http://werle.rewi.hu-berlin.de/tokio.pdf>

⁷³ Iwane Matsui, Trial International (June. 07, 2016) <https://trialinternational.org/latest-post/ivane-matsui/>.

⁷⁴ Tokyo War Crimes Trial, *supra* note 71.

⁷⁵ *Id.*

Although the case regarding the comfort women did not come up before the Far East Tribunal, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was held in Tokyo from the 8th to 12th December 2000 for the purpose of making a judgment on Japanese military sexual slavery before and during the Second World War. The Tribunal in 2000 was organised by non-governmental organisations in order to redress this issue from an international law and gender justice perspective.⁷⁶ The accused involved the Emperor Hirohito, General Matsui Iwane, among others and found them guilty of individual and superior responsibility.⁷⁷

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY) AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

THE BIRTH OF ICTY

Following the Second World War, the United Nations was formed, and the world community resolved that never again will they sit by and let another Holocaust happen. However, this promise was going to be broken time and again. The world witnessed the Guatemala's 36-year long Civil War⁷⁸, Indonesia's 1965 Massacre⁷⁹, the Khmer Rouge⁸⁰, the Bangladesh's

⁷⁶ Rumi Sakamoto, *The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the 'Comfort Women' issue*, 3 New Zealand Journal of Asian Studies, 1 49-58 (2001).

⁷⁷ *Women's International War Crime Tribunal*, Women's Initiative for Gender Justice (May. 13, 2015 13:37 GMT) <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html>

⁷⁸ Last year, the Supreme Court convicted two men for the systematic rape of 15 indigenous women during the 1980s. See, Nina Lakhani, *Justice at Last for Guatemalan women as military officers jailed for sexual slavery* (Mar. 1, 2016, 11.01 GMT) <https://www.theguardian.com/world/2016/mar/01/guatemala-sexual-slavery-sepur-zarco-military-officers-jailed>

⁷⁹ See, Yenni Kwok, *Indonesia's Mass Killings of 1965 Were Crimes Against Humanity*, International Judges Say (July. 20, 2016) <http://time.com/4414438/indonesia-crimes->

Liberation War, and many others but chose not to react. The UNSC chose to use the means of sanctions and other equally passive steps to chastise the State party involved.⁸¹

However, in 1992, when news regarding the ethnic cleansing in the former Yugoslavia started pouring in, the UNSC was moved to take action.⁸² Some attribute it to the fact that the Cold War had thawed by then, some others say it is because of the role played by media in bringing the images of these atrocities to our television screens, but another group of people reason that it was because these crimes took place on European soil and seemed like a real threat to the Westerners.⁸³ As a result, the UNSC established the UN's first Ad Hoc International Criminal Tribunal to prosecute war crimes, crimes against humanity, and genocide according to the power vested in it under Article 41 of the UN Charter.⁸⁴

against-humanity-1965/; Samantha Hawley, Australia, UK, US all complicit in Indonesian 1965 massacres, international judges say (July. 21, 2016 03:00 AM) <http://www.abc.net.au/news/2016-07-21/1965-indonesian-mass-killings-were-crimes-against-humanity/7647274>.

The International People's Tribunal at The Hague held on July. 20, 2016 that Australia, the United Kingdom, and the United States were complicit in facilitating the 1965 mass killings in Indonesia. The report also noted that there was also systematic and routine sexual violence, especially against women. The panel had held a four-day hearing from November 10 to 13, 2016, in the Hague. Some of the witnesses appearing before the panel were victims of sexual violence, and they gave evidence behind a screen to protect their identity.

⁸⁰ The victims and witnesses of the atrocities perpetrated by the Khmer Rouge report forced marriages, rapes, sexual assaults, and murders. See, Duong Savorn, *The Mystery of Sexual Violence under the Khmer Rouge Regime* (Jan. 17, 2013, 08:39 GMT) http://gbvkr.org/wp-content/uploads/2013/01/Mystery_of_Sexual_Violence_during_KR_ENG-web.pdf

⁸¹ Kelly Dawn Askin, "Never Again" Promise Broken Again. Again. And Again, 27 *Cardozo L. Rev* 4, 1723-1724 (2006)

⁸² *Id.* at 1724.

⁸³ Gabrielle Kirk McDonald, *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 *Colum. J. Transnat'l L.* Kelly Dawn Askin, "Never Again" Promise Broken Again. Again. And Again, 27 *Cardozo L. Rev* 4, (2000-2001).

⁸⁴ *Security Council Resolution. 827*, (1993) U.N. SCOR, 48th Sess., 3217th mtg. at 1, S/RES/827 (1993).

THE RWANDAN GENOCIDE AND ICTR

When the ethnic cleansing in Yugoslavia was followed closely by the genocide in Rwanda, the UN had to follow what it had done earlier. Thus, on November 8, 1994, the UNSC set up an International Criminal Tribunal for Rwanda (ICTR).⁸⁵

PROSECUTOR V. TADIĆ

On February 13, 1995, Prosecutor v. Tadić became the first international criminal trial in modern times to prosecute an individual (Duško Tadić) on the count of sexual violence as a crime against humanity^{86, 87}. On May 7, 1997, the ICTY found Tadić guilty of crimes against humanity (under Article 5 of the Statute for persecution on political, racial, or religious grounds and inhumane acts), and violations of the laws or customs of war (under Article 3 of the Statute for cruel treatment).⁸⁸ Thus, although rape was one of the counts he was charged under, the judgment found him guilty on counts other than of rape.

PROSECUTOR V. AKAYESU

On September 2, 1998 when the Trial Chamber gave its judgment in Jean-Paul Akayesu's case, it was significant on multiple counts. In the initial indictment, the Prosecutor had not included the count of sexual violence. It was only after the Trial Chamber granted leave to amend the indictment that

⁸⁵ *Security Council Resolution. 995(1994)*[Extension of the mandate of the UN Mission for the Referendum in Western Sahara and sending a mission of the Security Council to the region, with a view to accelerating the implementation of the Settlement Plan] ,U.N. SCOR, 49th Sess., 3453d mtg. at 1, S/RES/955 (1994).

⁸⁶ *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, Article 5(g).

⁸⁷ *Prosecutor v. Tadić, (Initial Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-I-I).

⁸⁸ *Prosecutor v. Tadić, (Trial Chamber Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-I-I, May. 7, 1997) (Sept. 21, 2011, 04:45 GMT) <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (accessed Apr. 13, 2017) [hereinafter *Tadić Judgment*].

rape was included as a crime against humanity under Count 13.⁸⁹ The Trial Chamber found Akayesu guilty on the count of rape by attributing command responsibility to him for the acts of those under him.⁹⁰

The judgment was also the first to define rape, by terming it as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁹¹ Sexual violence was defined more broadly as “any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed: (a) as part of a widespread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”⁹² It went as far as to say that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁹³

Another remarkable aspect about this judgment was that the Trial Chamber recognised that the acts of rape and sexual violence constituted the elements of genocide, since it was committed with the specific intent to destroy a specific group (Tutsi women) and constitutes “infliction of serious bodily and mental harm on the victims... one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm”.⁹⁴

One of the debates surrounding the judgment is with regard to the evidentiary standard in this case for rape was relatively low and is often attributed to the fact that rape in this case was considered as an element of

⁸⁹ *Prosecutor v. Akayesu (Amended Indictment)* (International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-I).

⁹⁰ *Prosecutor v. Akayesu (Trial Chamber Judgment)*(International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, Sept. 2, 1998) [hereinafter *Akayesu Judgment*], at ¶ 452.

⁹¹ *Akayesu Judgment*, at ¶ 598.

⁹² *Id.*

⁹³ *Id.* at ¶ 688.

⁹⁴ *Id.* at ¶ 731.

genocide.⁹⁵ However, it is interesting to note that the *Akayesu judgment* found Akayesu guilty on counts of both crimes against humanity and genocide. It went on to observe that “multiple convictions for these offences in relation to the same set of facts is permissible.”⁹⁶

PROSECUTOR V. KUNARAC

On February 22, 2001, the ICTY pronounced its first judgment where the accused was convicted for the offence of Rape.⁹⁷ However, instead of ascribing to the coercion-dominant definition of rape that was laid down in the *Akayesu judgment*, the Trial Chamber of the ICTY resorted to the question of consent while determining the crime.⁹⁸ One of the main criticisms regarding the Trial Chamber’s judgment is with regard to its reliance on the definition based on domestic rape law⁹⁹.

However, one of the possible justification for the higher evidentiary standard in this case (*vis-à-vis* the *Akayesu Judgment*) would be because, rape was recognised as an element of genocide in the *Akayesu Judgment* and genocide as a crime has a pretty high threshold, whereas the threshold for crimes against humanity is generally lower.¹⁰⁰ It is worth noting however, that the Appeals Chamber in this case, while looking at the definition of rape stated that, to classify it as a war crime it must be established that but for the armed conflict, the rape would not have been committed.¹⁰¹

⁹⁵ Caleb J. Fountain, *Sexual Violence, the Ad Hoc Tribunals and the International Criminal Court: Reconciling Akayesu and Kunerac*, 19 ILSA J. Int’l & Comp. L. 251, 257 (2012-2013).

⁹⁶ *Akayesu Judgment*, supra note 51, at ¶ 469-470.

⁹⁷ *Prosecutor v. Kunarac, et al.*, (Trial Chamber Judgment) (International Criminal Tribunal for the Former Yugoslavia Case No. IT-96-23-T & IT-96-23/1-T, Feb. 22, 2001) [hereinafter *Kunarac Judgment*].

⁹⁸ Caleb J. Fountain, supra note 56, 254.

⁹⁹ *Id.*

¹⁰⁰ Caleb J. Fountain, supra note 56, 255-256.

¹⁰¹ *Prosecutor v. Kunarac, et al.*, (Appeal Judgment) (International Criminal Tribunal for the Former Yugoslavia Case No. IT-96-23-T & IT-96-23/1-A, Jun. 12, 2002) at ¶ 218.

PROSECUTOR V. MUCIĆ

One of the accused in this case was an individual who was charged for subjecting victims to rape in the course of the interrogation. The Trial Chamber agreed with the definition provided in the *Akayesu Judgment*. It found that this would amount to torture and incorporated it into the offences under the statute of the ICTY under grave breaches and violations of the laws of customs of war.¹⁰² The Appeal against the same was dismissed.¹⁰³

PROSECUTOR V. FURUNDZIJA

The Trial Chamber in the present case felt the need to eradicate the ambiguity concerning the specific elements relate to rape, and in order to redress the same, looked at domestic law definitions to aid the formulation. It consequently defined rape as –

- i. the sexual penetration, however slight:
 - a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b) of the mouth of the victim by the penis of the perpetrator;
- ii. by coercion or force or threat of force against the victim or a third person.¹⁰⁴

¹⁰² *Prosecutor v. Mucić, et al., (Trial Chamber Judgment)* (International Criminal Tribunal for the Former Yugoslavia Case No. IT-96-21-T, Nov. 16, 1998) ¶ 1253 [hereinafter *Mucić Judgment*].

¹⁰³ *Prosecutor v. Mucić, et al., (Appeals Chamber Judgment)* (International Criminal Tribunal for the Former Yugoslavia Case No. IT-96-21-A, Feb. 20, 2001).

¹⁰⁴ *Prosecutor v. Furundzija, (Trial Chamber Judgment)* (International Criminal Tribunal for the Former Yugoslavia Case No. IT-95-17/1-T, Dec. 10, 1998) at ¶185 [hereinafter *Furundzija Judgment*].

PROSECUTOR V. NYIRAMASUHUKO

Pauline Nyiramasuhuko holds the dubious honour of being the first woman to be convicted in an International Court.¹⁰⁵ This was a remarkable development in itself because, although the victims and witnesses appearing before the ICTY had recounted the instances where heinous crimes were committed against them by women, none of them were prosecuted against.¹⁰⁶

On August 10, 1999, Nyiramasuhuko was charged on various counts including that of genocide, crimes against humanity, serious violation of common Article 3 of the Geneva Convention and Additional Protocol II (this included humiliating and degrading treatment, rape and indecent assault).¹⁰⁷ Although the Trial Chamber found insufficient evidence to pursue rape as genocide, it found that Nyiramasuhuko bears superior responsibility for the events that transpired at the Butare prefecture office, where she ordered the *Interhawme* to rape the Tutsis there.¹⁰⁸ The Appeals Chamber went on to affirm the same.¹⁰⁹

THE INTERNATIONAL CRIMINAL COURT

THE ROME STATUTE

The Rome Statute that entered into force in July 1, 2002 was able to learn from the experience of the two Ad Hoc Tribunals. There has been a marked

¹⁰⁵ *Rwanda: Ex-Women's minister guilty of genocide, rape*, BBC (June. 24, 2011) <http://www.bbc.com/news/world-africa-13507474>

¹⁰⁶ Merima Husejnovic, *Bosnian War's Wicked Women Get off Lightly*, Balkan Transitional Justice (Feb. 07, 2011) <http://www.balkaninsight.com/en/article/bosnian-war-s-wicked-women-get-off-lightly>

¹⁰⁷ *Prosecutor v. Pauline Nyiramasuhuko, (Amended Indictment)* (International Criminal Tribunal for Rwanda Case No. ICTR-97-21-I, Aug. 10, 1999).

¹⁰⁸ *Prosecutor v. Pauline Nyiramasuhuko, (Trial Chamber Judgment)* (International Criminal Tribunal for Rwanda Case No. ICTR-98-42-T, June. 24, 2011) at ¶ 6183.

¹⁰⁹ *Prosecutor v. Pauline Nyiramasuhuko, (Appeals Chamber Judgment)* (International Criminal Tribunal for Rwanda Case No. ICTR-98-42-A, Dec. 14, 2015) at ¶3539.

increase in the proportion of cases that charge the accused for sexual violence.¹¹⁰

Moreover, it cannot be denied that the provisions of the Statute show a concerted effort to facilitate the prosecution of gender violence or sexual violence.

The various forms of sexual violence find explicit mention under Crimes against Humanity (Article 7) and War Crimes (Article 8). Article 7 provides for Crimes against Humanity. Article 7(1)(h) includes 'gender' as an 'identifiable group' under this.¹¹¹ The Prosecutor, under Article 42(9), is empowered to appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children. The Office of the Prosecutor (OTP) under Luis Moreno-Ocampo worked to establish the Gender and Children Unit. Under Article 54(1)(b), the Prosecutor is required to take appropriate measures during the investigation and prosecution of crimes to respect the interests and personal circumstances of victims and witnesses, including age, gender, and health and also take into account the nature of the crime, especially when it involves sexual violence, gender violence or violence against children.

Further, the Statute recognises the principles of participation, protection, and reparation for the victims. The Victims and Witnesses Unit within the Registry that comes under Article 43(6) of the Statute provides for consultation with the OTP, protective measures, security arrangements, counselling and other appropriate assistance. Moreover, Article 68 focuses on the aspect of protection of victims and witnesses. Article 68 considers the protection of victims and witnesses and their participation in proceedings.

¹¹⁰ WILLIAM A. SCHABAS, ET AL, *supra* note 29, at 26.

¹¹¹ *Rome Statute Of The International Criminal Court*, U.N.T.S. 90, (entered into force 1 July, 2002), Article 7(1)(h) - "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".

Article 68(2) considers the use of electronic means to enable the participation of witnesses, especially in cases where the witness is a victim of sexual violence or a child. The forms of reparations available to the victims under Article 75 include restitution, compensation, and rehabilitation.

CONVICTIONS BEFORE THE ICC

While it is a fact that a larger proportion of cases filed before the ICC have charged the accused with sexual violence, only about 16% of those accused of war crimes, crimes against humanity, and genocide have been convicted of crimes of sexual violence through international legal mechanisms.¹¹²

The first conviction before the ICC in a case on sexual violence was that of the *Prosecutor v. Jean-Pierre Bemba Gombo*¹¹³. In this case, the Chamber looked at rape as a war crime and a crime against humanity.¹¹⁴ While the elements of crime for Article 7(1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) were mostly referred to, the *Furundzija Judgment*¹¹⁵ and the *Akayesu Judgment*¹¹⁶. The Chamber found instances of rape on various occasions¹¹⁷ and attributed individual criminal responsibility for the same on Bemba.¹¹⁸

¹¹² Philipp Schulz, *The ICC and Crimes of Sexual and Gender Violence*, Justice Hub (Aug. 11, 2015) <https://justicehub.org/article/icc-and-crimes-sexual-and-gender-based-violence-sgbv>

¹¹³ *Prosecutor v. Jean-Pierre Bemba Gombo, (Trial Chamber III Judgment)* (International Criminal Court, Case No. ICC-01/05-01/08, Mar. 21, 2016).

¹¹⁴ *Id.* at ¶98.

¹¹⁵ *Furundzija Judgment*, *supra* note 66.

¹¹⁶ *Akayesu Judgment*, *supra* note 51.

¹¹⁷ *Id.* at ¶638.

¹¹⁸ *Id.* at ¶741.

ISSUES

SELECTIVE INVESTIGATION BY THE PROSECUTION

As the first Prosecutor Luis Moreno-Ocampo is criticised for his failure to learn from the history of the earlier International Criminal Tribunals.¹¹⁹ In the first case that the OTP started investigating against Thomas Lubanga, he chose to focus on the war crime of recruitment, conscription and use of child soldiers.¹²⁰ The evidence regarding rape was produced as violence against these child soldiers. Therefore, the majority in Trial Chamber did not make any findings regarding whether responsibility is to be attributed to the accused with regard to sexual violence, as the same was not charged against the accused.¹²¹

REPARATION FOR VICTIMS

It was only on October 21, 2016 that the ICC approved and gave the go-ahead to the Trust Fund for Victims the go-ahead for the implementation of its symbolic collective reparations in relation to the *Lubanga Case*.¹²² Although these reparations in themselves is commendable, it means very little to the victims themselves, and many would prefer a monetary award as compensation instead.¹²³ Moreover, the selective prosecution at the ICC also means that some of the victims will never receive any compensation.

¹¹⁹ WILLIAM A. SCHABAS, ET AL, *supra* note 29, at 9.

¹²⁰ *Id.* at 11.

¹²¹ *Prosecutor v. Thomas Lubanga, (Trial Chamber I Judgment)* (International Criminal Court, Case No. ICC-01/04-01/06, Mar. 14, 2012) at ¶913.

¹²² Sharon Nakandha, *ICC Makes Progress on Reparations for Victims of in Lubanga Case*, International Justice Monitor (Oct. 27, 2016), <https://www.ijmonitor.org/2016/10/icc-makes-progress-on-reparations-for-victims-in-lubanga-case>.

¹²³ *Id.*

INSUFFICIENT FOCUS ON SEXUAL VIOLENCE AGAINST MEN

In the case of *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, the judges did not find that the forcible circumcision and penile amputation conducted on Luo men to amount to sexual violence as they were not sexual in nature.¹²⁴ The judges subsequently chose to withdraw the cases against him.¹²⁵

For all its jurisprudence on gender-based violence and sexual violence in general, the International Criminal Law jurisprudence still falls short of completely recognising the myriad forms of sexual violence perpetrated upon men in armed conflict.

CONCLUDING REMARKS: THE WAY FORWARD

It is understandable that as an International Court with limited resources, the ICC will not be able to effectively prosecute every individual on all instances of sexual violence. However, in doing so, the ICC denies justice to the victims of the crimes that are never charged or never convicted. Therefore, for all its efforts in addressing the wrongs and bringing justice to the victims, the ICC still falls short of its goals. The OTP needs to focus on prosecuting the individuals on more counts of sexual violence. It is only then that the future perpetrators of armed conflict be effectively deterred from committing sexual violence against men, women, and children.

¹²⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, (Trial Chamber II Decision)* (International Criminal Court, Case No. ICC-01/09-02/11, (Mar. 8, 2011) at ¶27.

¹²⁵ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, (Trial Chamber V Decision)* (International Criminal Court, Case No. ICC-01/09-02/11, Mar. 18, 2013).